No 86-1543

In the Supreme Court of the United States

OCTOBER TERM, 1986

PETERSON PAINTING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board abused its discretion by directing an employer who had unlawfully changed the terms and conditions of employment after contract expiration to reinstitute those terms and conditions and apply them to all bargaining unit employees.

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OPINIONS BELOW

The decision of the court of appeals enforcing the order of the National Labor Relations Board is reported at 804 F.2d 1253 (Table). The court's unpublished opinion is reprinted in the unnumbered appendix to the petition for certiorari.[1] The decision and order of the National Labor Relations Board (Pet. App. lla-12a), and the decision of the administrative law judge (Pet. App. 13a-35a), are reported at 277 N.L.R.B. 103.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1986. The order of the court denying a

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[1]For ease of reference, we have assigned numbers to the pages of petitioner's appendix. Thus numbered, the court's opinion appears at Pet. App. 7a-10a.

petition for rehearing was entered on December 17, 1986 (Pet. App. 36a). The petition for a writ of certiorari was filed on March 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a residential painting contractor. From 1971 to 1983, petitioner was a member of the Painting and Decorators Contractors Association of Central Coast Counties (PDCA), a multi-employer bargaining group. Petitioner's painting employees were represented by District Council of Painters No. 33 (the Union) and were covered by the collective bargaining agreements between the Union and the PDCA. Pet. App. 8a.

On December 8, 1982, petitioner timely withdrew from the PDCA. It also advised the Union that it would terminate the 1980 PDCA contract when it expired on June 30, 1983. Pet. App. 8a.

On February 2, 1983, the Union asked petitioner to begin negotiations for a successor agreement covering its employees. Petitioner did not respond. On June 8, 1983, the Union again requested bargaining, and petitioner again failed to respond.[2] On June 29, a Union representative telephoned petitioner to inquire about negotiations. Petitioner stated that the company had not yet decided whether it would sign a successor agreement. Pet. App. 8a. The following day, petitioner advised the Union that it would not enter into

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[2]In early 1983, well before the Union's bargaining requests, petitioner's president, Victor Peterson, had already advised several of his employees that he was "contemplating going nonunion and [that] if he did so, they could continue working for him if they wanted to; that they would be offered benefits comparable to what the union gave them, including an IRA account to replace the Union's pension, and that he would treat them fairly." Thereafter, in May and June 1983, Peterson told various of his employees that he was "definitely going nonunion" and would not sign a successor contract with the Union. Pet. App. 19a.

negotiations for a new contract (*id.* at 8a, 22a). The parties never bargained for a successor agreement (*id.* at 8a).

The PDCA contract expired on June 30, 1983 (Pet. App. 8a). Immediately thereafter, petitioner withdrew recognition from the Union and stopped paying wages and benefits required under the contract, including payments to the Union trust funds (*id.* at 8a, 19a). Petitioner told its employees that it had gone nonunion and that it would not complete its union projects. Petitioner's six painting employees left the company because they wished to work on union jobs. *Id.* at 8a. In their place, petitioner hired new employees. It negotiated individual wage and benefit packages with each new employee, as well as with certain former employees whom petitioner eventually rehired. *Id.* at 8a, 19a.

2. Adopting with minor modifications the decision of the Administrative Law Judge (Pet. App. 11a-35a & n.3), the Board concluded that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1) and (5), by withdrawing recognition from and refusing to bargain with the Union; by unilaterally changing the wages and benefits of bargaining unit employees; and by dealing directly with unit employees concerning wages and benefits (Pet. 11a-12a, 27a). The Board also concluded that petitioner had constructively discharged its former employees by requiring them to forego union representation as a condition of continued employment, in violation of Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3) (Pet. App. 23a, 27a).

As a remedy, the Board ordered petitioner to recognize the Union as the exclusive representative of all bargaining unit employees and, on request, to bargain with the Union for a successor agreement. The Board further ordered petitioner to reinstate those employees that it had constructively discharged and to make each of them whole for any

loss of pay or other benefits. Finally, until such time as petitioner and the Union agreed to new terms and conditions or bargained to an impasse, the Board ordered petitioner to reinstitute, and apply to all unit employees, the terms and conditions of the expired agreement, including the duty to pay into the Union benefits funds those sums that would have been paid absent petitioner's violations. Pet. App. 25a-26a, 29a, 30a.[3]

3. The court of appeals, in an unpublished memorandum (see Pet. App. 7a n.*), unanimously enforced the Board's order (*id.* at 7a-10a). Noting that "[t]he Board's discretion to formulate an appropriate remedy is exceedingly broad" (*id.* at 9a), the court rejected petitioner's claim that the Board had exceeded its authority when it devised a remedy that covered employees hired by petitioner after June 30 (*ibid.*).[4] The court next distinguished (*id.* at 9a-10a) the decision in *Carpenter Sprinkler Corp.* v. *NLRB*, 605 F.2d 60 (2d Cir. 1979), on which petitioner had principally relied. The court of appeals observed (Pet. App. 9a-10a) that in *Carpenter Sprinkler* the Second Circuit had found a Board remedy excessive because the employer in that case had changed wages and benefits "only after substantial bargaining, a strike had occurred and * * * [the employer], in good faith, believed that a bargaining impasse had been reached." The court concluded (Pet. App. 10a) that none of those factors applied to petitioner. Rather, the court found (*ibid.*) that petitioner's conduct "approached brazen disregard for its employee's statutory rights."

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[3]Petitioner was not required to make payments for those discharged employees who received benefits after June 30, 1983, from other employers who themselves made contributions to the benefit funds pursuant to a collective bargaining agreement with the Union (Pet. App. 26a).

[4]The court of appeals addressed only the question of remedy, since petitioner did "not deny that it [had] acted unlawfully" (Pet. App. 9a).

ARGUMENT

The court of appeals' decision is correct and is not in conflict with any decision of this Court or any other court of appeals. Further review by this Court is accordingly unwarranted.

1. Petitioner contends (Pet. 27-31) that the Board exceeded its statutory authority by ordering that the reinstituted terms and conditions cover not only the discharged employees but also those employees hired after June 30, 1983. Relying (*id.* at 29) on the "reinstatement" provisions of Section 10(c) of the Act, 29 U.S.C. 160(c), petitioner claims that the "remedial authority [of] * * * the Board is intended to be made applicable to those who were employed at the time of the unfair labor practice and who suffered from the resulting discrimination." Petitioner's contention is meritless.

As petitioner acknowledges (Pet. 25), Section 10(c) "charges the Board with the task of devising remedies to effectuate the policies of the Act." *NLRB* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346 (1953). "The Board's power is a broad discretionary one" (*Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964)), and its chosen remedy will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943)). Accord *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-899 (1984); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 193-194 (1941); *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 600 (1941).

In the present case, the Board ordered that petitioner's unilateral changes in the terms and conditions of employment be revoked and that the former contractual arrangements be reinstituted until new negotiations proved successful or reached an impasse. That decision was plainly

correct. Petitioner reached agreement with the new hires only by refusing to bargain with the Union. The Board's determination that petitioner should not enjoy the benefits of its unilateral contractual changes—even as those changes affected the new hires—clearly accords with the policy of the Act to discourage employers from unlawfully refusing to bargain with the representatives of their employees. See *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 336 (1944) ("individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees"); *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 361 (1940) ("Since the contracts were the fruits of unfair labor practices * * * and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by § 10 of the Act").[5]

2. Petitioner asserts (Pet. 31-36) that the Board's order violates the due process and equal protection rights of the new hirees and also abridges their "freedom * * * [to] contract * * * advantageously with a nonunion employer" (*id.* at 37). These claims are frivolous. First, petitioner did not raise these claims in the court of appeals and is therefore disabled from pressing them now. See *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328-329 (1945) (per curiam); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935).

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[5]Petitioner is mistaken in contending that the portion of Section 10(c) authorizing a reinstatement remedy is somehow intended to limit the scope of the Board's remedial authority. By its terms, Section 10(c) identifies reinstatement only as an example of the kinds of remedies that the Board is entitled to impose. See *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. at 539 ("the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay"); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. at 198-199.

In any event, employees do not have a "freedom * * * [to] contract * * * with a nonunion employer" (Pet. 37) where the scheme of the Act, including remedies otherwise properly imposed for an employer's past violations, obliges the employer to bargain with a union. Here, the remedy was properly imposed to protect the bargaining unit employees and to reinstitute the status quo ante in the bargaining unit until the employer satisfied his bargaining obligation by reaching a new agreement or bargaining to an impasse. And petitioner is simply mistaken in his belief that the reinstitution of the previous contractual terms will require the new hires to join the Union while a new agreement is being negotiated. See *NLRB* v. *Haberman Const. Co.*, 618 F.2d 288, 302 n.16 (5th Cir. 1980); *Cartwright Hardware Co.* v. *NLRB*, 600 F.2d 268, 272 (10th Cir. 1979); *Sun Oil Co.* v. *NLRB*, 576 F.2d 553, 558 (3d Cir. 1978).

3. Finally, petitioner speculates (Pet. 40-45) that the new hires may never join the Union, and thus the Board issued a "penal" (*id.* at 41) order when it required petitioner to make payments to the Union trust funds on behalf of all employees. But for petitioner's unlawful practices, however, contributions for all bargaining unit employees would have been made to the funds, including on behalf of those persons hired after June 30, 1983. Moreover, trust fund benefits are available to all bargaining unit members, regardless of union membership. Cf. *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 797-798 (2d Cir. 1974).[6]

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[6]For the reasons stated by the court of appeals (Pet. App. 9a-10a), petitioner's reliance on the Second Circuit's decision in *Carpenter Sprinkler* is misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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